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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Held

Serial No. 76513337

Paul M. Denk, Esq. for Robert F. Held.

Dezmona J. Mizelle-Howard, Trademark Examining Attorney,
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Before Hohein, Drost, and Walsh, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 28, 2003, Robert F. Held (applicant) applied
to register the mark WILDFLOWER MIST (in typed or standard
character form) on the Principal Register for goods
identified as an "air freshener that applies directly onto
an air vent register" in Class 5. Serial No. 76513337.

The application was based on applicant's allegation of a
bona fide intention to use the mark in commerce.

Subsequently, applicant submitted an amendment to allege

use that contains a date of first use of February 2004 and a date of first use in commerce of June 2004.

The examining attorney refused to register the mark on the ground that the mark, when applied to the goods, is merely descriptive. 15 U.S.C. § 1052(e)(1). After the examining attorney made the refusal final, this appeal followed.

The examining attorney argues that "WILDFLOWER describes the scent of the air fresheners and MIST describes the mode in which the goods will be used." Brief at 4. In response, applicant argues that its "product does not mist" and the term "Wildflower is used suggestively, as an attractant to entice purchasers to purchase the product, and use it, but it just does not describe any ingredient thereof." Brief at 5.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (A "mark is merely descriptive if the ultimate consumers immediately associate it with a quality

or characteristic of the product or service"); In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

To be merely descriptive, a term need only describe a single significant quality or property of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); Meehanite Metal Corp. v. International Nickel Co., 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959). We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is merely descriptive. Abcor, 200 USPQ at 218.

The examining attorney has submitted definitions of "wildflower" as "a flowering plant that grows in a natural, uncultivated state" and "mist" as "fine drops of a liquid, such as water, perfume, or medication, sprayed into the air." *The American Heritage Dictionary of the English Language* (3rd ed. 1992). In addition, the examining attorney points to applicant's specimen that informs prospective purchasers that: "The Wild Flower fragrance controls odors throughout the entire house, without leaving any heavy perfume scent." The scent of an air freshener is a significant feature of such a product. The Federal Circuit has held that the term APPLE PIE is merely descriptive of potpourri. In re Gyulay, 820 F.2d

1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987). Similarly, the term CREME DE MENTHE for chocolate mint candy squares was held to be merely descriptive. In re Andes Candies Inc., 478 F.2d 1264, 178 USPQ 156, 157 (CCPA 1973) ("Applicant argues that its mark only *suggests* a flavor similar to that of the liqueur. If that were so registration would be proper. We think however that the mark *demand*s that, and only that, flavor"). See also In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985) ("The perception of the term as descriptive in the case now before us is based on the ordinary meaning of the word 'APRICOT' and the fact that applicant's dolls are promoted as having the scent of apricot"). Similarly, when consumers see the term "Wildflower" on air fresheners, they would expect that the term describes the scent of the product.

Next, we consider the term "mist" in applicant's mark. Applicant suggests that "[e]ven the term Mist is not descriptive in Applicant's mark, since it provides an aroma, from its chemical composition, that apparently vaporizes into a gas, to provide its pleasant aroma, generated from its chemical makeup." Brief at 5. To "vaporize" means "to cause to change into vapor" and "vapor" is defined as "a visible exhalation, as fog, mist,

steam, smoke, or noxious gas, diffused through or suspended in the air."¹ Applicant's own argument leaves open the possibility that applicant's goods vaporize as a mist. We also point out that there is nothing in applicant's identification of goods that prevents applicant's air fresheners from vaporizing in "mist" form when attached to an air vent register.

Furthermore, the examining attorney has submitted evidence that the term "mist" has been disclaimed when used in association with similar products. See, e.g., Registration No. 2,791,351 (ZUM MIST, "mist" disclaimed, for "scented room sprays, body sprays and scented linen sprays"); No. 2,562,769 (ORCHARD MIST, "mist" disclaimed, for "air fresheners");² and No. 1,503,554 (WINNING MIST, "mist" disclaimed, for "room air freshener"). Third-party registrations can be used like a dictionary to illustrate how the term is perceived in the trade or industry. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987) ("[T]hird party registrations are of use only if they tend

¹ *The Random House Dictionary of the English Language* (unabridged) (2d ed. 1987). We take judicial notice of these definitions. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

² Applicant mistakenly refers to the mark in this registration as ORCHID MIST when arguing that its mark is not descriptive. Obviously, an orchid would have a recognizable scent, but an orchard would not.

to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this proper, limited manner, third party registrations are similar to dictionaries showing how language is generally used") (internal quotation marks deleted). These registrations provide some support for the examining attorney's argument that the term "mist" is merely descriptive of air fresheners.

We also add that several cases have held that the term "mist" is descriptive when applied to products that have similar characteristics to applicant's. See In re Aid Laboratories, Inc., 223 USPQ 357, 359 (TTAB 1984) ("'BUGMIST' immediately tells prospective purchasers a significant characteristic of the goods, namely that the product may be used in mist form on bugs"); Knapp-Monarch Co. v. Dumas Milner Corp., 137 USPQ 614, 616 (TTAB 1963) ("Mist" is "descriptive of goods dispensed through aerosol products"); and Swiss Pine Importing Co. v. Gold Seal Co., 132 USPQ 687, 688 (TTAB 1962) (The "evidence of record establishes that the designation "LAVENDER MIST" accurately describes the essential characteristics of applicant's product, i.e., a lavender scented deodorant in mist form"). Therefore, the term "mist" would describe

applicant's air fresheners that vaporize into a mist.³

Finally, when faced with a question of whether a term is merely descriptive, it is not enough to analyze the individual elements of the term. We must consider the mark as a whole in determining the question of descriptiveness. Therefore, in this case we must ultimately decide if the term WILDFLOWER MIST is merely descriptive of an "air freshener that applies directly onto an air vent register." Here, applicant's air fresheners are described as having a "Wild Flower fragrance" and the product is an air freshener that attaches directly to an air vent register. When viewed in association with applicant's goods, the term WILDFLOWER MIST immediately describes the fact that applicant's air fresheners are wildflower-scented that release fine drops of the fragrance into the air. The fact that applicant's goods include a wildflower fragrance mist is a significant feature of the goods. As such, applicant's mark is merely descriptive of the goods.

Decision: The examining attorney's refusal to register the term WILDFLOWER MIST on the ground that the

³ We add that if applicant had established that its goods were not a mist, in light of the evidence that "mist" is used to describe air fresheners, there would have been a question of whether applicant's term was deceptively misdescriptive of the goods. 15 U.S.C. § 1052(e)(1).

mark is merely descriptive of the involved goods is affirmed. In addition, we note that after his request for reconsideration was denied, applicant not only filed an appeal brief but also filed a "request that the mark of this application be transferred to the supplemental register." Amendment C. Applicant's brief (p. 5) requests the "examiner's further review of this request." The examining attorney responded to applicant's request with the following comment: "Applicant's amendment to the Supplemental Register is noted and accepted." Examining attorney's brief at 6. Therefore, the application is forwarded to the examining attorney for appropriate action.